

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDY LEWIS WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

March 3, 2005

No. 252730

Wayne Circuit Court

LC No. 03-001048-01

Before: Kelly, P.J., and Saad and Smolenski, JJ.

KELLY, P.J. (*concurring*).

I concur with the majority's decision to affirm defendant's convictions and sentence. I disagree, however, with its underlying determination that defendant waived his challenge to the trial court's ruling with respect to evidence of the victim's sexual history with another person.

At the beginning of trial, the parties agreed that the victim's sexual history was neither relevant nor admissible under the rape-shield statute, MCL 750.520j. Later, after the victim testified on direct examination, and outside the presence of the jury, defense counsel asserted that two exceptions to the rape-shield statute were potentially applicable. Defense counsel argued that he should be permitted to question the victim about her sexual history to demonstrate that her knowledge of sperm was unrelated to the charged conduct. The trial court permitted limited questioning about the victim's knowledge of sperm. Defense counsel also argued that the victim's prior sexual history was relevant to show that the victim was motivated to falsely accuse defendant. The trial court did not permit questioning in this regard.

After the trial court set the boundaries for cross-examination, the following colloquy occurred:

MR. SCHWARTZ: Well, whatever. Your Honor, I think that I can operate with what the Court has said, that I should ask her, before this happened, was she -- did she know what sperm looked like.

THE COURT: Remind her, yesterday, did you testify that you knew what sperm looked like? Presumably she's going to yes [sic].

MR. SCHWARTZ: And before --

THE COURT: And then say, well, did you know what it looked like before the first time you had sex with him.

MR. SCHWARTZ: Right.

THE COURT: And then you move on.

MR. SCHWARTZ: And I think that's fine, your Honor.

THE COURT: All right.

MR. SCHWARTZ: And certainly that's why we're having this discussion, I don't want to overstep the bounds of what's happening here and get this all sorted out before we cross-examine. [Emphasis added.]

In my opinion, the record does not demonstrate defense counsel's agreement with the trial court's application of the rape-shield statute. Nor does it demonstrate that defense counsel "expressed satisfaction with" the trial court's evidentiary ruling. The record simply indicates defense counsel's agreement to *abide by* the trial court's evidentiary ruling. An agreement to operate within the confines of a trial court's adverse evidentiary ruling does not establish a waiver of the evidentiary issue. To the contrary, it represents compliance with the fundamental rules of trial procedure: a party proffers evidence, the trial court makes an evidentiary ruling, the issue is preserved and trial continues.

Although I do not believe defendant waived this issue, I do believe that the trial court properly excluded evidence of the victim's sexual history to show that the victim was motivated to falsely accuse defendant. A determination whether evidence is admissible under the rape-shield statute, MCL 750.520j, "is entrusted to the sound discretion of the trial court." *People v Hackett*, 421 Mich 338, 349; 365 NW2d 120 (1984). "In exercising its discretion, the trial court should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation." *Id.* While evidence of specific instances of a victim's sexual conduct with others is generally inadmissible, there are some narrow exceptions, including permitting evidence of a complainant's sexual conduct with others if the information is probative of "ulterior motive for making a false charge." *Id.* at 348.

Nothing in the record supports defendant's speculative argument that the victim may have been motivated to make false accusations against him. To begin with, the victim's mother, not the victim, raised the allegations after finding the young victim and the thirty-one-year-old defendant in the bathroom together. The victim's mother¹ reported the activity to the police a week later, after defendant made a statement of admission to her and after Harris contemplated defendant's conduct. Further, there was no indication that the victim ever tried to hide her other sexual relationship. In his brief on appeal, defendant acknowledges that the victim informed the

¹ The victim's mother is listed as the complaining witness in the January 1, 2003, warrant.

police about her consensual relationship with someone closer to her age. This information is also contained in the police report.

Under theses circumstances, the trial court did not err in excluding the evidence of the victim's sexual history with another person for the purpose of showing an "ulterior motive."

/s/ Kirsten Frank Kelly